STATE OF MICHIGAN

COURT OF APPEALS

SAMUEL A. RAGNONE,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF FENTON and FENTON TOWNSHIP RESIDENTS ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED
November 2, 2006

No. 267530
Genesee Circuit Court
LC No. 05-081754-CK

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff, Samuel Ragnone, appeals the trial court's order that granted summary disposition to defendant, Fenton Township. We affirm.

I. Facts

Ragnone was a partner in L.J.S. Partnership which, along with William Bishop and Bernard C. Norko Marital Trust ("Norko Trust"), owned approximately 177 acres of vacant land in Fenton Township. L.J.S., Bishop, and Norko Trust each owned an undivided one-third interest in the Fenton property. The property owners attempted to rezone the land from agricultural to residential mobile home with the goal of building a manufactured home park. Ragnone, as a licensed attorney, represented the property owners in court and before the Fenton Township zoning board of appeals. The property owners and Fenton ultimately entered into a consent judgment in which Fenton agreed to permit the development.

However, Fenton residents, including members of defendant Fenton Township Residents Association (FTRA), filed petitions to hold a referendum election on whether Fenton should comply with the consent judgment. The residents voted that Fenton should repudiate the consent judgment and Judge Archie Hayman set the judgment aside. This Court later reversed the trial court's order and reinstated the consent judgment in *LJS Partnership v Fenton Charter Twp*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2004 (Docket No. 248311). During these underlying proceedings, Ragnone, "on behalf of an entity to be formed," signed a purchase agreement with the owners of the property but, because his financing repeatedly fell through, he delayed closing the sale. Ultimately, Ragnone became a member of or partner in Crystal Creek Estates, L.L.C. and the company bought the property in August 2004.

Ragnone filed this action and alleged that Fenton breached the consent judgment and that this caused him to lose his financing to buy the property and forced him to spend more than $600,000 in litigation costs. Ragnone also asserted that Fenton's alleged breach of the consent judgment resulted in a higher price for the land and caused him to lose his 100 percent interest in the property. The trial court granted summary disposition to Fenton on the grounds that Ragnone did not have standing to bring his claims against Fenton.[1]

II. Analysis

Ragnone argues that he has standing to litigate Fenton's repudiation of the consent judgment. We disagree.

As a preliminary matter, we note that the trial court should not have considered or decided the issue of Ragnone's standing under MCR 2.116(C)(5). See *Michigan Chiropractic Council v Comm'r of Office of Financial and Ins Services*, 475 Mich 363, 374; 716 NW2d 561 (2006); *Leite v Dow Chemical Co*, 439 Mich 920, 920; 478 NW2d 892 (1992); MCR 2.201(B), (C). Instead, the trial court should have decided the motion under MCR 2.116(C)(8) or (C)(10). *Leite, supra*. Because the trial court considered documents outside the pleadings and because the evidence is necessary for our de novo review of this issue, we analyze Ragnone's claims under MCR 2.116(C)(10). See *Computer Network, Inc v AM General Corp*, 265 Mich App 309, 312-313; 696 NW2d 49 (2005).[2]

As our Supreme Court recently stated in *Michigan Chiropractic Council, supra* at 371 n 13:

> In order to establish standing, a plaintiff must establish three elements: (1) that the plaintiff has suffered a concrete " " 'injury in fact" " '; (2) the existence of a causal connection between the injury and conduct complained of that is " " 'fairly . . . trace[able] to the challenged action of the defendant" " '; and (3) that the injury will likely be " " 'redressed by a favorable decision." " ' *Lee* [*v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001),] quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992) (citations omitted).

Our Supreme Court further explained in *Bowie v Arder*, 441 Mich 23, 42-43; 490 NW2d 568 (1992):

> The question of standing is not merely whether a party has a "personal stake" in the outcome that will ensure "sincere and vigorous advocacy." . . . .

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[1] Ragnone voluntarily dismissed his claims against FTRA, but he reserved the right to appeal the issue of standing.

[2] "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

However,

> "[o]ne cannot rightfully invoke the jurisdiction of the court to enforce private rights, or maintain a civil action for the enforcement of such rights, unless one has in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. This interest is generally spoken of as 'standing' . . . ." 59 AmJur2d, Parties, § 30, p 414.

We hold that the trial court correctly granted summary disposition to Fenton because Ragnone did not have a legally protected interest in the cause of action.

A consent judgment like the one in this case is construed as a contract. *Inverness Mobile Home Community, Ltd v Bedford Twp*, 263 Mich App 241, 248; 687 NW2d 869 (2004). It is undisputed that Ragnone signed the consent judgment as a representative of L.J.S. Partnership, not in his individual capacity. The general rule in Michigan is that a third party may not sue on a contract. *Koenig v City of South Haven*, 460 Mich 667, 677 n 3; 597 NW2d 99 (1999). Ragnone argues that L.J.S. Partnership intended that the consent judgment would be his personal property and that he spent his own money to procure the consent judgment. However, " '[a] third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof.' " *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 190; 504 NW2d 635 (1993), quoting *Greenlees v Owen Ames Kimball Co*, 340 Mich 670, 676; 66 NW2d 227 (1954).

Rather, "[t]he rights and duties of parties to a contract are derived from the terms of the agreement." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003). To his brief in opposition to Fenton's motion for summary disposition, Ragnone attached pages 1, 2 and 8 of the consent judgment. The judgment states that the plaintiffs to the lawsuit, L.J.S. Partnership, Ronald Sabo, trustee of the Norko Trust, and William Bishop, are the owners of the Fenton property and the document clarifies that "they are the only persons with an ownership interest in the Subject Property." The document further provides that the plaintiffs sought to rezone the property to develop the land and that the plaintiffs filed the lawsuit to obtain a use approval and for damages. The consent judgment further states that, after negotiating with the plaintiffs, Fenton agreed that the proposed development was reasonable. Based on this plain language, it is clear that the use approval in the consent judgment was intended to benefit the *plaintiffs*, the land owners. L.J.S. Partnership had an ownership interest in the land, and it was a plaintiff to the litigation that brought about the consent judgment. Ragnone had no individual ownership interest in the land and he was not a named plaintiff in the litigation.

"For purposes of litigation, a partnership is considered a separate entity." *George Morris Cruises v Irwin Yacht & Marine Corp*, 191 Mich App 409, 414; 478 NW2d 693 (1991). However, a partner may establish an individual right to maintain a cause of action if he or she has a claim independent of the partnership or if the partner is designated in the lawsuit as a partner litigating on behalf of the partnership. *Id*., citing MCL 600.2051(2). Ragnone did not file the current action for breach of the consent judgment in a representative capacity on behalf of the partnership. Further, he has not shown that he has a claim that is independent of the partnership's claims. In other words, because it is L.J.S. Partnership's right to sue for Fenton's alleged failure to follow the consent judgment, Ragnone has not shown that he has a claim that is

distinct from that of the partnership itself. Accordingly, he does not have standing to maintain his cause of action for a breach of the consent judgment.

Ragnone contends that, through a consent partnership resolution, L.J.S. Partnership intended that the consent judgment would be Ragnone's personal property. The intent of the partners in executing the consent partnership resolution is not relevant to the enforcement or interpretation of the consent judgment and does not create a right for Ragnone to sue for its breach. Further, it is well settled that " '[p]arol evidence of contract negotiations, or of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.' " *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 492; 579 NW2d 411 (1998), quoting *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 580; 458 NW2d 659 (1990). Moreover, the consent judgment does not incorporate the resolution and the consent judgment is clear and unambiguous that it only binds the L.J.S. Partnership, as one of the plaintiffs, and not the individual partners in that organization.

Were we to consider the consent partnership resolution, we note that it was executed five months before the consent judgment was entered. Accordingly, it does not appear that it was intended to confer "ownership" of the consent judgment to Ragnone or to otherwise assign the rights in the judgment to Ragnone. Further, the resolution itself does not state that the partnership intended that the consent judgment would be Ragnone's personal property. The document states that Ragnone signed a purchase agreement, "on behalf of an entity to be formed," to buy the Fenton property and states that Ragnone was not acting for the partnership when he entered the purchase agreement. The document further provides that the partners agree that Ragnone spent his own money in his efforts to have the property rezoned and that he is not entitled to any reimbursement for his expenses. Finally, the resolution states that, when Ragnone closes on his purchase of the property, the partnership would automatically dissolve. The resolution does not state, in any manner, that Ragnone would be entitled to "own" the consent judgment or that the partnership intended for him to have an independent right to recover for its breach.[3]

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[3] We note that, at oral argument on Fenton's motion for summary disposition, Ragnone referred to an assignment by Ron Sabo, trustee of the Norko Trust. Ragnone asserted that, though he did not attached the document to his summary disposition brief, the document reflects that Sabo intended to transfer Norko Trust's interest in the consent judgment to Ragnone. The transcript indicates that Ragnone showed the assignment to the trial judge and argued that it established, in part, his right to sue under the consent judgment. A document entitled "Assignment of Interest" is in the lower court file. However, Ragnone has not filed the document on appeal and he does not assert a specific argument on appeal that he is acting as an assignee of the Norko Trust. Ragnone merely argues that, in some unspecified manner, the consent judgment was assigned to him by *all* of the property owners and he cites the two hearing transcript pages in which he referred to the Norko Trust assignment. It is well settled that "[i]t is not enough for an appellant in his brief simply to announce a position or assert and error and then leave it up to this Court to discover and rationalize the basis for his claims . . . ." *Moses Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006). Further, "[a] party who fails to brief the merits of an alleged

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Ragnone argues that, regardless whether he was a party to the consent judgment, he was clearly an intended third-party beneficiary of the judgment. The third-party beneficiary statute, MCL 600.1405, states in relevant part:

> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person.

However, "not every person incidentally benefited by a contractual promise has a right to sue for breach of that promise." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003). Rather, "only intended, not incidental, third-party beneficiaries may sue for a breach of a contractual promise in their favor." *Id*. As our Supreme Court also explained in *Schmalfeldt*:

> A person is a third-party beneficiary of a contract only when that contract establishes that a promisor has undertaken a promise directly to or for that person. MCL 600.1405; *Koenig v South Haven*, 460 Mich 667, 677; 597 NW2d 99 (1999). By using the modifier directly, the Legislature intended to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. *Id*. An objective standard is to be used to determine, from the form and meaning of the contract itself, *Kammer Asphalt v East China Twp*, 443 Mich 176, 189; 504 NW2d 635 (1993) (citation omitted), whether the promisor undertook to give or to do or to refrain from doing

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error has abandoned the issue on appeal." *Villadsen v Mason Cty Road Comm'n*, 268 Mich App 287, 303; 706 NW2d 897 (2005).

Were we to consider the document, as Ragnone acknowledges in his appeal brief, "[a]n assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). By filing this action Ragnone is not attempting to "enforce" the consent judgment to compel Fenton to permit construction of a manufactured home park. Rather, he seeks damages for the amount he personally spent on litigating the issue. Indeed, Ragnone repeatedly states that none of the other parties spent anything on the litigation. Accordingly, while, arguably, Norko Trust would have a claim for breach of the consent judgment, the trust did not apparently suffer any damages by Fenton's initial repudiation of the agreement. Were Ragnone to stand in the trust's position, therefore, he could not collect his personal expenses unless Norko Trust spent the money or was liable to Ragnone for the money. Moreover, part of Ragnone's claim is that the property owners raised the price of the property from $1 million to $2.5 million because of the litigation over the consent judgment. Clearly, as the seller of the property, Norko Trust has no claim for damages on this issue because it was one of the parties that presumably raised the price. Norko Trust would also clearly have no basis to recover on the grounds that Ragnone lost 80 percent of his "potential" interest in the property – this is simply not a claim that Norko Trust would be entitled to make in a breach of contract action.

something directly to or for the person claiming third-party beneficiary status . . . .

Ragnone asserts that the consent judgment refers to him and the opening paragraphs state that the parties are those with an interest in the property. Ragnone maintains that, read in harmony, these references indicate that he is an intended beneficiary of the agreement. We disagree. While the judgment states that it would be enforceable even if Ragnone bought the property, it does not indicate that he has any personal rights in the agreement or remedy for its breach. Further, the judgment's reference to the "interested parties" specifically states that the "*plaintiffs*" (L.J.S. Partnership, Norko Trust, and William Bishop) are the only persons or entities with an interest in the property. This language does not include Ragnone and, indeed, explicitly *excludes* him as an interested party because he was not a plaintiff to the action, nor an owner of the property. Accordingly, the consent judgment does not clearly contain a promise to do something directly for the benefit of Ragnone and his claim that his is a third-party beneficiary, therefore, fails.[4]

The consent judgment *does* state that entry of the judgment is contingent upon execution of the document by the property owners or pursuant to a valid purchase agreement by Ragnone or an entity to be formed by him. Arguably, this suggests that Fenton intended to be bound by the agreement if Ragnone bought the property. This could be interpreted as a promise to Ragnone to fulfill the terms of the consent judgment, but only *if he buys the property*. However, Ragnone did not buy the property personally; Crystal Creek Estates, L.L.C. bought the property.[5] If Ragnone wanted to argue that subsequent purchasers of the property could sue for breach of the consent judgment, he should have brought the action in the name of the actual, subsequent purchaser, Crystal Creek Estates, or on its behalf.[6]

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[4] Ragnone asserts that the trial court also erred when it failed to consider the entire consent judgment when it made its ruling. However, Ragnone only attached three pages of the consent judgment to his summary disposition brief and the trial court considered the paragraphs on those pages. Ragnone will not be heard to argue about the trial court's failure to consider the entire document when his own conduct prevented the court from doing so. *Hilgendorf v St John Hosp and Medical Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001).

[5] We further note that, while Ragnone repeatedly asserts that he has a right to "enforce" the consent judgment, it is undisputed that, as to the parties bound by it, the consent judgment is in force. Ragnone's lawsuit is not intended to compel Fenton to perform under the agreement, i.e., to once again agree that the owners may build a manufactured home park. Indeed, it is undisputed that the current owner of the property (of which Ragnone is a member or partner), has not attempted to construct a manufactured home park and is currently seeking permission to build something else – a planned unit development with a commercial component. Accordingly, Ragnone is not attempting to "enforce" the consent judgment, but is suing for damages on the grounds that Fenton's early repudiation of the judgment caused him a pecuniary loss.

[6] Ragnone also asserts that Fenton negotiated only with Ragnone and that he filed the case that resulted in the consent judgment in the property owners' names merely to "appease the lower court judge who erroneously equated standing with property ownership." Ragnone presented no evidence to establish that he alone negotiated with Fenton. Nonetheless, Ragnone admittedly acted as counsel for the property owners in the litigation, so it would not be unusual for him to

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For the reasons stated, the trial court correctly granted summary disposition to Fenton because Ragnone lacked standing to maintain this action for an alleged breach of the consent judgment.[7]

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen

I concur in result only.

/s/ Helene N. White

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do so. Moreover, Ragnone conceded that he agreed to dismiss his second lawsuit and file the third one because he and Fenton agreed that he could not bring an action against Fenton in his own name. Accordingly, Ragnone's argument is unpersuasive.

[7] With regard to Ragnone's claims against FTRA, he does not distinguish between Fenton and the FTRA in making any of his arguments on appeal. Further, Ragnone signed a stipulation that indicates that, if he lacked standing to sue Fenton, the trial court would also rule that he lacks standing to sue the FTRA. Because Ragnone makes no argument why FTRA should remain in the litigation and because he apparently concedes that he has no claim against FTRA if he does not prevail on the standing issue against Fenton, we affirm the stipulation and order in which Ragnone agreed to dismiss FTRA.